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ALEXANDER L. STEVAS,

No. 82-1162

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE BANTA COMPANY, INC., BANTA DIVISION,
PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner discriminated against returning strikers on the basis of their continuing participation in a strike.

2. Whether substantial evidence supports the Board's finding that the Union did not waive any reinstatement rights accorded to employees by the National Labor Relations Act.

3. Whether the Board's proceedings denied petitioner due process of law.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1 to A-28) is reported at 686 F.2d 10. The Board's decision and its order (Pet. App. B-1 to B-102) are reported at 256 N.L.R.B. 1197.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1982. A petition for rehearing was denied on October 13, 1982 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed on January 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As of early 1977, the respondent Union[1] represented bindery and warehouse employees in two of petitioner's facilities (Pet. App. B-5, B-10). On April 4, 1977, the parties having failed to reach agreement on a new contract, petitioner announced that it was implementing its last contract offers. All of the employees represented by the Union thereupon went out on strike (Pet. App. B-5 to B-6, B-52).

The Union filed unfair labor practice charges with the Board alleging that petitioner had implemented its last contract offer in the absence of a bargaining impasse, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). A complaint was issued by the General Counsel alleging that petitioner had violated the Act as charged and that the ensuing strike was an unfair labor practice strike. A hearing was set for July 1977 and the Board determined to seek injunctive relief from a district court, under Section 10(j) of the Act, 29 U.S.C. 160(j) (Pet. App. B-6).

The hearing on the complaint was not held, and injunctive relief was not sought, however. Instead, on July 22, 1977, petitioner signed a formal Settlement Stipulation agreeing to revoke implementation of its last contract offers and, upon the making of unconditional offers to return to work by striking employees, to offer those employees immediate and full reinstatement to their former positions or to substantially equivalent positions without prejudice to their seniority or other rights or privileges, discharging, if necessary, any new employees hired after April 4, 1977.

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[1]Until March 1978, petitioner's employees were represented by two locals of the Graphic Arts International Union — Locals 32-B and 88-L. The two locals merged at that time to form Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO (Pet. App. B-5; A-2). They are all referred to here as "the Union."

Under the stipulation, if insufficient jobs were available to effect the reinstatement of all strikers, those who could not be reinstated were to be placed on a preferential hiring list according to their seniority and given offers of reinstatement as jobs became available (Pet. App. A-3; B-6, B-53, B-73, B-74). On September 22, 1977, the General Counsel signed this Settlement Stipulation and forwarded it to the Board for approval (Pet. App. A-3; B-53, B-76).

Between September 13 and October 4, 72 strikers resigned from the Union and abandoned the strike (Pet. App. B-53, B-76). On October 4, the parties returned to the bargaining table where petitioner presented its contract proposals. Petitioner also distributed to the Union, for the first time, copies of a "preferential reinstatement system" which it had drawn up. Petitioner proposed that the preferential reinstatement plan govern the return of employees at the strike's end (Pet. App. B-54, B-76).

The Union objected to petitioner's reinstatement plan, arguing that employees should be reinstated after the strike on the basis of their unit seniority (Pet. App. B-56 to B-58). On October 6, petitioner again submitted a contract proposal and its reinstatement plan, labeling this submission its "absolute last and final" offer (Pet. App. B-58). The Union repeated that the contract was unacceptable, and petitioner's officials left the meeting (*ibid.*).

On October 8, the Union's members voted to authorize the Union to make an unconditional offer to return to work on their behalf, to accept petitioner's contract proposals, and to inform petitioner that they considered its reinstatement plan contrary to their rights under the Act (Pet. App. B-59 to B-60). That same day, the Union signed the Settlement Stipulation previously executed by petitioner and the General Counsel in connection with the unfair labor practice charges filed against petitioner the preceding April (Pet.

App. B-60). The Union immediately notified the Company that it had joined in the Settlement Stipulation, that the strike was over, and that it was making an unconditional offer to return to work on behalf of all employees represented by the Union. Finally, the Union informed petitioner that its members had accepted petitioner's final contract offers, but that (Pet. App. A-4; B-60):

> We do not agree with the Company's interpretation of the statutory rights of returning employees, as set forth in the [Company's reinstatement plan]. We will rely on the statutory rights of reinstatement as provided by the NLRA and the Settlement Stipulation described above, and, of course, we do not waive any of those rights.

Petitioner accepted the Union's unconditional offer to return to work, but stated that its preferential reinstatement plan (*ibid.*):

> was and is an integral part of our October 6, 1977, offer. Since you have not accepted our total offer, there is no contract * * *. Construing your letter as a counter proposal, we reject it for reasons previously advanced.

Two days later, the Union reaffirmed its intention to accept the "total offer, including your [preferential reinstatement plan] to the full extent that the [plan] does not violate the legal reinstatement rights of the striking employees" (Pet. App. A-4). The Union added (*id.* at A-5):

> If it is the entent [sic] of your letter of October 8, 1977 to assert that it was a condition of your offer that there be a waiver of the right to present to the NLRB any question as to the legal reinstatement rights of the strikers which may not be essectuated [sic] by your proposed [reinstatement plan], please advise us so that we may give further consideration to our position.

Petitioner responded (Pet. App. A-5; B-60):

> It is our understanding that while you have accepted our total offer, you have reserved the right to challenge the legality of all or portions of the [preferential reinstatement plan]. This is, of course, your right and we do not construe your acceptance of our total offer as a waiver of any rights under the [Act] except to the extent such rights are waivable and have been waived by the language of the Agreement.

No permanent replacements had been hired during the strike; and at the end of the strike all temporary replacements were terminated (Pet. App. B-52 to B-53, B-76). At the end of the strike, petitioner assigned each employee who had abandoned the Union and had crossed or offered to cross the picket line before the strike's end to the job classification and wage rate that employee had held prior to the strike, without regard to its production needs or the work, if any, actually performed by that employee during the strike. Petitioner then recalled some full-term strikers to the jobs remaining after all of the "cross-overs" had been placed in their pre-strike positions. Those positions, which petitioner deemed "vacant," were generally lower paying ones (Pet. App. A-15 to A-16; B-63 to B-67, B-77 to B-78).

In addition petitioner immediately granted all cross-overs their pre-strike pay rates on a "permanent" basis and granted them full contractual rate-retention rights so that they were paid at their pre-strike rates even while performing tasks ordinarily assigned a lower rate. Meanwhile, full-term strikers attempting to work their way back up to their pre-strike positions were required to satisfy tests of "permanency" at each step of the progression before gaining rate-retention at that step (Pet. App. B-67 to B-68, B-70 to B-73, B-78). Cross-overs were absolutely insulated for three years from "bumping" or displacement by full-term strikers, while full-term strikers with machine or job seniority

rights superior to those of cross-overs were precluded, even after being recalled, from exercising those rights to regain their positions in the active workforce (Pet. App. B-67, B-70 n.34, B-77, B-78).

2. On October 20, 1977, the Union filed a second set of unfair labor practice charges against petitioner alleging that the preferential reinstatement plan as implemented violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3). The Union also alleged that the reinstatement plan as implemented violated the terms of the Settlement Stipulation (Pet. App. A-5; B-7, B-9). Five days after these charges were filed, petitioner notified the Board that it was withdrawing from the Settlement Stipulation. This matter was litigated in separate proceedings. It was ultimately determined that petitioner had no right to withdraw from the stipulation settling the first round of unfair labor practice charges (Pet. App. A-5 to A-6; B-7 to B-8).[2]

In April 1978, a complaint premised on the Union's second set of unfair labor practice charges issued, alleging that petitioner had violated Section 8(a)(1) and (3) of the Act by granting preferential reinstatement rights or preferential seniority rights to jobs and rates of pay to those employees who abandoned the strike before its end, and by denying seniority and the benefits of seniority for purposes of job assignment and rates of pay to those employees who

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[2]On July 14, 1978, the Board entered an order enforcing the terms of the settlement. Petitioner appealed to the Court of Appeals for the Fourth Circuit, which in August 1979 issued a decision enforcing the Board's order. *George Banta Co.* v. *NLRB*, 604 F.2d 830 (1979), cert. denied, 445 U.S. 927 (1980) (hereinafter "*Banta I* "). The Fourth Circuit held that petitioner could not unilaterally withdraw from the Settlement Stipulation and that by the terms of that agreement, petitioner had bound itself to accord the strikers reinstatement rights "coincid[ing] precisely with those of unfair labor practice strikers" (604 F.2d at 832; footnote omitted). See Pet. App. A-6, A-14; B-6 to B-9.

remained on strike until the strike was abandoned by the Union (Pet. App. A-7, A-21 to A-22; B-9 to B-10).

At the hearing on this complaint, counsel for the General Counsel argued that petitioner's preferential reinstatement plan was unlawful under the Act only if the strike had concerned unfair labor practices (Pet. App. A-7 to A-8, A-19 to A-21; B-80). During the course of the hearing, however, the Administrative Law Judge ruled preliminarily that because the Settlement Stipulation (the Board's approval of which petitioner was seeking to overturn (see page 6 note 2, *supra*) set forth the striker's reinstatement rights, it was unnecessary to determine whether the strike had been an economic or an unfair labor practice strike (Pet. App. A-8; B-8 to B-9). The Board affirmed the ALJ's ruling that the Settlement was dispositive of the issue whether the strikers were entitled to the reinstatement rights of unfair labor practice strikers. However, in light of the possibility, cited by the General Counsel, that the Settlement might be overturned by the Court of Appeals for the Fourth Circuit, the Board directed that the ALJ entertain background testimony concerning the nature of the strike (Pet. App. A-8; B-9).

In October 1978, the ALJ rendered a decision finding petitioner's reinstatement plan as implemented "inherently discriminatory and unlawful" under the Act, regardless of the validity of the Settlement or whether the strike was premised on economic or unfair labor practice issues (Pet. App. B-78 to B-80). The ALJ ruled further that, even if the legality of petitioner's reinstatement procedures depended on whether the strike had been economic or caused by unfair labor practices, the Settlement gave its employees the reinstatement rights of unfair labor practice strikers (*id.* at B-52, B-74 n.36). Finally, the ALJ found that a bargaining impasse had existed on April 4, 1977; and therefore the strike was economic (*id.* at B-51 to B-52).

While the ALJ's decision in this matter was pending Board review, the Fourth Circuit issued its opinion in *Banta I* (see page 6 note 2, *supra*), holding that petitioner remained bound by the Settlement Stipulation under which it had agreed to reinstate all strikers according to their seniority, discharging any replacements if necessary to effect reinstatement of the strikers. Subsequently, the Board issued its decision and order in the instant proceeding, upholding the ALJ's rulings except for his finding concerning the nature of the strike. The Board found it unnecessary to reach that issue because *Banta I* had by then established the strikers' entitlement under the Settlement Stipulation to reinstatement in the manner accorded by law to unfair labor practice strikers (Pet. App. B-2 n.4).

3. The court of appeals enforced the Board's order in full, finding that substantial evidence on the record as a whole supported the Board's finding that petitioner unlawfully discriminated in favor of those employees who abandoned the strike by granting them preferential reinstatement and seniority rights without regard to petitioner's production requirements or the work, if any, those employees performed during the strike; and unlawfully discriminated against those employees who stayed out on strike by assigning them inferior jobs, wages and other benefits solely because they did not offer to return to work before the strike's end (Pet. App. A-15 to A-16). The court found petitioner's conduct unlawful on two grounds: first, because it denied its employees the post-strike reinstatement rights set forth in the Settlement Stipulation and, alternatively, because it violated the employee's statutory reinstatement rights under the rationale of *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

In affirming the Board's decision, the court rejected petitioner's claim that the Union had clearly and unmistakably waived the striker's reinstatement rights, finding nothing in

the language of the parties' contract indicating such waiver and finding, further, that the parties' negotiations concerning petitioner's preferential reinstatement system reflected an express refusal of the Union to waive those rights (Pet. App. A-18 to A-19). The court also found that, contrary to petitioner's contentions, the violation found was within the scope of the underlying complaint as issued by the General Counsel, that all pertinent issues had been fully and fairly litigated, and that petitioner suffered no prejudice from counsel for the General Counsel's statement at the hearing before the ALJ that petitioner's reinstatement procedures were unlawful only if the strike was an unfair labor practice strike (Pet. App. A-19 to A-27).

ARGUMENT

Petitioner contends that the decision of the court of appeals conflicts with established precedent respecting an employer's right to hire permanent replacements during an economic strike (Pet. 13-18); that the court erroneously failed to find that the Union's signing of its PRS document constituted a "clear and unmistakable waiver" of the striker's statutory rights to nondiscriminatory reinstatement (Pet. 18-23); and that the court improperly held that unfair labor practice liability can be predicated on an allegation that was outside the scope of the General Counsel's underlying complaint and that was not litigated at the hearing (Pet. 8-13). Petitioner's contentions lack merit and do not warrant review by this Court.

1. It is settled that both economic and unfair labor practice strikers retain their status as "employees" under the Act,[3] and thus are entitled to immediate full reinstatement

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[3]Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3) defines "employee" to include "* * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *."

to their former positions without prejudice to their seniority or other employment rights at the conclusion of their strike activity. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). An employer who denies such reinstatement violates Section 8(a)(3) and (1) of the Act unless he "can show that his action was due to 'legitimate and substantial business justifications.' " *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 378, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

The statutory reinstatement rights of economic and unfair labor practice strikers are identical except that only during an economic strike may an employer hire permanent replacement employees whom he need not displace in order to accommodate strikers who seek reinstatement. *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 379; *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). This is so because the "need of the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike" provides the " 'legitimate and substantial business justification' for requiring replaced economic strikers to wait for reinstatement until a vacancy occurs in the labor force." *Laidlaw Corp.* v. *NLRB, supra*, 414 F.2d at 105, quoting *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 379.

However, even during a purely economic strike, an employer cannot burden the statutory right to strike by according those who work during a strike a post-strike advantage over those who exercise their right to strike. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 223, 236-237 (1963) (an employer cannot lawfully grant replacements or nonstriking employees fictional seniority rights calculated to protect them from, and subject the strikers to, future

layoffs or terminations).[4] A discriminatory grant of post-strike employment rights divides the employees to the permanent disadvantage of former strikers and therefore is so "inherently destructive" of the right to strike as to be unlawful without the need of further inquiry into the employers' motivation. *Id.* at 231, 236-237; *NLRB* v. *Great Dane Trailers, Inc., supra,* 388 U.S. at 34.

Petitioner essentially contends (Pet. 13-18) that, because the strike was an economic strike, the cross-overs had, in effect, the same rights as permanent replacements and that the court of appeals' failure to accord them that status conflicts with the treatment allowed permanent replacements in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938) and *Giddings & Lewis, Inc.* v. *NLRB,* 675 F.2d 926 (7th Cir. 1982). However, both the Board and the court of appeals found that, even if the strike were economic, petitioner had, in the settlement agreement, undertaken to accord the strikers the right of unfair labor practice strikers who would be entitled to return to their jobs even if they were permanently replaced. To the extent that petitioner quarrels with that finding, it raises a fact-bound issue which does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951).

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[4]See also, *e.g., Rogers Manufacturing Co.* v. *NLRB,* 486 F.2d 644, 646-648 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974) (employer's refusal to accord employees seeking reinstatement full credit for their previously accrued seniority incompatible with right to strike); *Great Lakes Carbon Corp.* v. *NLRB,* 360 F.2d 19, 20-21 (4th Cir. 1966) (destructive of right to strike for employer to grant employees who abandon a strike preference with respect to protection from layoffs, shifts, and other employment rights); *Swarco, Inc.* v. *NLRB,* 303 F.2d 668, 670-673 (6th Cir. 1962), cert. denied, 373 U.S. 931 (1963) (destructive of right to strike for employer to promise pre-strike employees who abandon a strike immunity from "bumping" by later returning strikers with greater seniority).

Moreover, the court of appeals upheld the Board's finding that petitioner's post-strike reinstatement procedures afforded cross-overs significant advantages going beyond the guarantee of permanent tenure for permanent replacements approved in *NLRB* v. *Mackay Radio & Telegraph Co., supra,* and *Giddings & Lewis, Inc.* v. *NLRB, supra.* The Board found, and the court of appeals agreed, that petitioner granted post-strike preferential reinstatement and seniority rights to employees who abandoned the strike prior to its end — regardless of its production requirements or the work actually performed by the employees during or after the strike — and denied these rights to full-term strikers so that "a difference of a few hours caused by whether an employee offered to return to work before or after the strike's end had significant repercussions to the employee's wage rate and other benefits" (Pet. App. A-15 to A-16 (footnote omitted); B-63 to B-70, B-81).[5] Such discrimination plainly is prohibited by *NLRB* v. *Erie Resistor Corp., supra.*

2. Petitioner does not challenge the settled principle, applied by the Board and the court of appeals (Pet. App. A-19; B-79 to B-80), that a waiver of statutory rights must be demonstrated by "an express statement in the contract to that effect," *Drake Bakeries, Inc.* v. *Local 50, Bakery &*

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[5]Moreover, petitioner can lay no colorable claim to the business justification upon which an employer's right to hire permanent replacements is founded — that is, the need for the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike. Here, the Board's finding, sustained by the court of appeals, was that petitioner's post-strike "permanent" reinstatement of the cross-overs to their former positions, and its "temporary" reinstatement of full-term strikers to lower positions, were made on the basis of the employee's strike activity, without regard to petitioner's production needs or the work any employee actually performed during or after the strike (Pet. App. B-78 to B-79).

Confectionary Workers, 370 U.S. 254, 265 (1962). Yet petitioner has not at any stage of these proceedings identified any such language in its agreement with the Union. Of course, neither the Board nor the court below found such a waiver.[6] Here, as below, the only language petitioner points to (Pet. 21) is its own statement (see page 5, *supra*) that it did not construe the Union's acceptance of its total package as a waiver of the employees' reinstatement rights under the Act "except to the extent that such rights are waivable and have been waived by the language of the agreement." The court of appeals noted that the Union responded to petitioner's representations with an explicit statement that it would rely on the statutory rights of the strikers, as well as their rights under the Settlement Stipulation, and that it had refused to waive any of those rights (Pet. App. A-19). The court found that the course of the parties' dealings leading to settlement of the strike compelled the conclusion that "the parties had agreed to disagree about the legality of the [preferential reinstatement system] and the issue would be resolved in a subsequent challenge by the Union" (Pet. App. A-19). The court thus found that the parties' agreement "provides absolutely no support for the suggestion that a clear and unmistakable waiver of statutory rights took place here" (*ibid.*). Petitioner's fact-bound challenge to this finding warrants no further review.[7]

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[6]Petitioner's assertion (Pet. 18-22) that its written reinstatement plan "set[] forth the reinstatement rights of strikers in clear and unambiguous terms" is groundless. That document (Pet. App. E-1 to E-9) is entirely silent concerning "rate-retention" rights, the definition of "available" work, "temporary" as opposed to "permanent" reinstatement to particular positions, and the other factors that petitioner manipulated so as to discriminate against full-term strikers.

[7]Petitioner contends (Pet. 22) that a similar issue is presented in *Metropolitan Edison Co.* v. *NLRB*, No. 81-1664 (argued Jan. 11, 1983). But the issue there is whether a general no-strike clause and arbitral interpretations thereof could be deemed to constitute a clear

3. Petitioner claims finally (Pet. 8-13) that its due process rights have been infringed because counsel for the General Counsel asserted at the hearing that the legality of petitioner's reinstatement system depended on whether the strike concerned unfair labor practices. This contention is meritless. Contrary to petitioner's contention, this case does not present any issue concerning the General Counsel's prosecutorial authority to decide whether to issue, or to prosecute, or to reject an amendment to, an unfair labor practice complaint. The court below accepted as "axiomatic" the proposition that the " 'Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing' " (Pet. App. A-12 to A-13, quoting *NLRB* v. *Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981)). The issue in this case is whether the Board has the authority "to determine which issues *are* within the scope of a complaint" (Pet. App. A-25 n.17), and to decide those issues. The court below held that the Board does have such authority, and petitioner cites no case casting doubt on that proposition.[8]

Moreover, the court below carefully examined the manner in which the Board exercised that authority in this case and found no impropriety. Thus, the court examined the language of the complaint and concluded that "the violation found in this proceeding was the violation alleged in the

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and unmistakable waiver of the right of employees holding union office not to be subject to harsher discipline than other employees for participation in contractually prohibited work stoppages. There accordingly is no occasion to hold this case for disposition in light of No. 81-1664.

[8]To the contrary, petitioner relies (Pet. 11) on *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1040-1041 (8th Cir. 1976), in which the court expressly reaffirmed the holding of *Laclede Gas Co.* v. *NLRB*, 421 F.2d 610, 616-617 & n.16 (8th Cir. 1970), that where the allegations of a Complaint are "arguably broad enough" to encompass an issue, the Board may, in its discretion, decide that issue "with or without the consent of the General Counsel."

Complaint" (Pet. App. A-21), and there was nothing in the complaint itself to suggest that the legality of the conduct therein alleged to violate the Act depended on whether the strike concerned economic or unfair labor practice issues (*id.* at A-22).

To be sure, as the court noted (Pet. App. A-22), counsel for the General Counsel asserted to the ALJ that petitioner's implementation of its preferential reinstatement system violated the Act only if the strike was an unfair labor practice strike. However, the court also observed (Pet. App. A-22 to A-23) that petitioner has "not suggested any claims or evidence that it would have presented" but for the General Counsel's assertion that the strike concerned unfair labor practices; that the Union appeared as a party to the hearing and argued throughout that the conduct specified by the General Counsel in the complaint violated the Act regardless of the nature of the strike and thereby put petitioner on notice that it would have to address this contention;[9] and that "[a]ll pertinent issues and allegations were exhaustively litigated at the hearing — the method and times of employee reinstatement under the PRS, the consequences for seniority and wage rates, and [petitioner's] purported defenses of waiver and business justification." In short, the court properly determined that petitioner was not denied procedural due process, finding, instead, that petitioner understood the issues in this case "and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory" (*NLRB* v. *Mackay Radio & Telegraph Co., supra,* 304 U.S. at 350).

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[9]Although counsel for the General Counsel did not adopt this line of argument at the hearing, he never objected to the Union's assertion of its alternative position or sought to amend the complaint to preclude this argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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